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FOREIGN NATIONALS AND INTERNATIONAL LAW.*

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(*Continued from Vol. LXII, page* 90.)

Right to intervene of States on behalf of their nationals.—The right of States to intervene on behalf of their subjects and the principles governing such intervention are thus laid down by the Permanent Court of International Justice in a case that arose between Great Britain and Greece.[1] "It is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. The question whether the dispute originates in an injury to private interest which in point of fact is the case in many international disputes is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is the sole claimant. The State does not substitute itself for the subject

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1. Publications of the Court Series A, No. 2, p. 11, 1930 Y. B., p. 6.

and consequently factors foreign to the previous discussions between the individual and the competent authorities may enter into the diplomatic negotiations." In other words, the parties to such a dispute are the two States. The claimant State claims for an injury done to itself in the person of its national and it must establish in order to succeed a breach of international law. As further elaborated in a case between Germany and Poland,[2] "the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. The reparation due by one State to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The damage suffered by the individual is never identical in kind with that suffered by the State; it can only afford a convenient scale for the calculation of the reparation due to the State."

In order to justify an award on a claim in respect to an injury to a national it is essential that the person injured must be at the time of the injury a national of the claimant State and not of the respondent State and he must continue to be so at the time the claim is lodged and up to the time of the award. If it so happens that in the interval he ceases to be a national or he dies and his representative is not a national of the claimant State or is a national of the respondent State the claim fails. If some of the representatives alone are nationals of the claimant State only a proportionate amount can be awarded.

Though it is true that the remedy involved in these modes of approach are only for breaches of international law, there are other modes of resorts for breaches of international proprieties, *e. g.*, unfriendly acts like wholesale discrimination against nationals, namely, diplomatic insistence and on failure retortion or reprisal.

A certain school of international jurists, to whom we have already referred, of whom Bluntschli, Martens Fiore and Fauchili are among the most important, maintain that the law of nations guarantees every individual at home and abroad certain so-called natural or fundamental rights and such rights are said to be (*i*) the right of existence,

2. Publications of the Court Series A, No. 17, p. 26.

(*ii*) the right of protection of honour, life, health, liberty and property, (*iii*) the right of practising the religion of one's choice, (*iv*) the right of emigration, and (*v*) the right of entry into other States for all lawful purposes. The doctrine of fundamental rights is not accepted by Oppenheim and others. As regards some of these, the Committee of Jurists appointed by the League of Nations to study the question of codification report as follows : "Some rights are not rights created by States for the benefit of their nationals or of foreigners, namely, the right to life, the right to liberty and the right to own property. The community has simply recognised the existence of these rights and States have mutually undertaken to ensure the possibility of enjoying them. In fact, wherever a man goes, he takes his rights with him and wherever he is, it is the will of all States that these rights should be safeguarded." This is hardly distinguishable from the doctrine of fundamental rights of Bluntschli, though the categories are fewer. This is stated to be the minimum which a State should accord to foreigners in its territory. On the question as to how far the right to property goes, whether and if so to what extent international law forbids the application of measures conflicting with the principle of respect for vested rights and how far a State with a view to putting into operation some new or social economic policy may deprive persons of rights of property which they enjoy without awarding them adequate compensation, there is considerable divergence of opinion. We have already referred to the provisions in the treaties after the Great War and the provisions in the covenant of the League of Nations with a view to extracting therefrom a rule as to the minimum that is required to constitute civilised treatment. "International law," says Hall, p. 59, "is a product of the special civilisation of modern Europe and is intended to reflect the essential facts of that civilisation so far as they are fit subjects for international rules. Among these facts is the existence in almost all States of a municipal law, consonant with modern European ideas and so administered that foreigners are able to obtain criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the State. International law, therefore, contemplates the existence of such law and such administration and a State, professing to be subject to international law, is bound to furnish itself with them. If it

fails to do so, either through the imperfection of its civilisation or because the ideas upon which its law is founded are alien to those of the European peoples, other States are at liberty to render its admission to the benefits of international law dependent upon special provision being made to safeguard the person and property of their subjects. It is on this principle that capitulation and the extraterritorial privileges of European nationals are justified. It is on this principle that States are held liable for failure or denial of justice in their Courts in respect of foreigners.

Capitulations.—At various times from 1535 to the present century arrangements called capitulations were entered into with Turkey by various States the effect of which was to withdraw foreigners from the jurisdiction of Turkish Courts. Turkey was then outside the pale of international law. In 1856 by the treaty of Paris she was brought within the pale. Nevertheless, the extraterritorial privileges continued by reason it was said of her institutions not being in reasonable harmony with those of European countries. In 1914, Turkey by a unilateral Act renounced the capitulations. The Powers protested. The Great War intervening, no further discussions took place. By the treaty of Lausanne, 1923, the capitulations were abolished. Germany renounced them in 1917, and Soviet Russia in 1921. As a condition of the treaty of Lausanne, Turkey was willing to have an investigation into the judicial system of the country by a body of neutral lawyers. Non-nationals have now free access to Turkish Courts. In matters of marriage, divorce, wills, guardianship, succession on death and family law for non-Moslem nationals of the allies, the national tribunals established in the country of the party whose personal status is in question will alone have jurisdiction. The parties, if they think fit, may submit to Turkish Courts.

In Japan the extraterritorial privileges conferred on foreigners when the country was thrown open to foreigners were given up by Great Britain in 1899.[3]

In Siam, so far as British subjects were concerned, the exercise of extraterritorial rights was governed by a treaty of 1855. By a treaty of 1883 a special Siamese Court was established for the purpose. In 1909, this system was terminated on the coming into force of Siamese Codes and British subjects were

3. (1895) A. C. 644.

placed under the jurisdiction of the Siamese Courts. In 1920 the United States by a treaty agreed to relinquish her privilege on the coming into force of a series of judicial codes in five years. Germany and Austria relinquished them by the treaties of Versailles and St. Germaine.

In Persia, they ceased in 1928 but subject however to certain safeguards. As regards China, a resolution was adopted by the United States, Belgium, the British Empire, France, Italy, Japan, the Netherlands and Portugal at the Washington Conference agreeing to appoint a Commission to investigate and report on the possibility of relinquishing extraterritorial privileges. By their report in 1926 the Commission recommended the eventual abolition of the privileges but by reason of the political condition of the country the recommendations are in abeyance. Britain was prepared for a "sympathetic adjustment of treaty rights to the equitable claims of the Chinese". Several countries have already agreed to renounce the rights. Germany lost it by the treaty of Versailles, Austria-Hungary by the treaty of St. Germaine, Russia by a declaration in 1921 and later by a formal agreement in 1924. Again, in 1908, China denounced the protege system by which great extraterritorial powers claimed and exercised jurisdiction over subjects of lesser ones and in consequence the practice was relinquished. China also protested against the grant of nationality to Chinese people and Chinese companies by extraterritorial powers. Belgium also entered into a treaty in 1928 agreeing to submit to local and national jurisdiction in 1930 on some arrangements coming into force, in the event of the majority powers agreeing to do so. Spain also entered into a similar treaty in 1929. Italy entered into a treaty in 1928 postponing surrender of extraterritorial rights till other Powers agreed in accordance with Washington Conference recommendation. Portugal agreed to renounce from 1930. Japan and France have not yet agreed. The abolition of these treaties which is denounced as "unequal" treaties looms very large in the policy of the Chinese Government to-day. As it is, 16 countries including Great Britain exercise jurisdiction over their own nationals in their own Courts which are independent of the Chinese Ministry of Justice. The British system is full and provides for provincial Courts, a Supreme Court at Shanghai and a full Court acting as a Court of Appeal from all the Courts with appeals

in some cases to the Privy Council. These Courts are in the eye of the law really territorial courts exercising delegated jurisdiction. That is the view taken by the Privy Council in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*[4] and, as a result, the land laws of China have got to be administered by these Courts and the Chinese law cannot be regarded as foreign law. China herself concurrently with the old system of Courts which seem to be unsatisfactory has a modern system of Courts presided over by lawyers educated abroad which seem to be quite satisfactory. Under this system there is a Supreme Court at Peking, a High Court in each Province and a District Court in each District. There is a complete code of civil and criminal procedure governing the procedure of these courts. But foreigners naturally prefer their own Courts. But it is difficult to delay the happening of what has already taken place in Japan, Siam and Turkey.

In Egypt, extraterritorial jurisdiction is exercised in a somewhat different way owing to the establishment of international tribunals called mixed courts. In civil and commercial matters and for some police offences, most foreigners in Egypt are subject to the jurisdiction of the mixed courts while as regards other criminal matters they are subject to the jurisdiction of their own consular courts. Abyssinia, China, Egypt, Morocco, Koweit, Muscat and Bahrein are only places where these extraterritorial privileges survive.

State Liability for action of State authority.—The first article of the resolution of the Institute of International Law declares that a State is responsible for damage caused to foreigners by any act or omission which is contrary to international obligation on the part of any State authority, be it constitutional, legislative, governmental, administrative or judicial. The American-Mexican Mixed Claims Commission, 1926, in the Neer case[5] (October 15, 1926) without attempting to lay down a precise formula, expressed the opinion "that the propriety of governmental conduct should be judged by international standards and that in order to constitute an international delinquency the treatment of an alien must amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every rea-

4. (1901) A. C. 373.

5. (1927) 1 Y. B. p. 183.

sonable and impartial man would readily recognise its insufficiency. Whether the insufficiency results from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial." In the case of *Faulkner*[6] (November 2, 1926), the Commission allowed compensation where an American had been arrested and kept for some days in a Mexican house of detention under intolerable circumstances of indignity and inconvenience; in the case of Roberts " for unreasonable delay in bringing the arrested man before a Mexican tribunal " four months being the maximum period allowed by the Constitution of Mexico while in this case seven months had elapsed; in Youman's case for lack of due diligence in punishing perpetrators of mob violence; in Quintanilla's case for not accounting for the prisoner who was killed when in custody, it not appearing by whom he was killed, whether by the mob or the custodian. It was held to be a denial of justice "when there had been unnecessary delay in the trial, the accused had not been informed of the charges and was not confronted with his accusers and the hearings in the open court had been mere formality lasting only five minutes the whole procedure disclosing a want of seriousness in the Court." Similarly failure to prosecute the accused charged with offences against foreign nationals, granting of amnesty to the offenders, allowing the guilty party to escape from prison and failure to apprehend him subsequently and great delay in proceedings have all been held breaches of international duty. The existence of mere irregularities in the trial of an accused when they are matters of form rather than of substance does not necessarily constitute denial of justice. The trial of a man three times in succession, when there was a probable cause to justify prosecution and the evidence was insufficient to show that the Mexican law had been maliciously applied was held not to amount to a breach of international requirements. It was contended by the American counsel in one case that the detention of the accused in the absence of the establishment of *corpus delicti* was not justifiable under the Mexican law and the detention in those circumstances afforded a cause of action but the Court was of opinion that such a statute would be contrary to international law since it might interfere

6. (1927) Y. B. 184.

with the duty of a State in the discharge of its primary duty of administering justice[7] and its breach could not afford a cause of action. In another case, the Mexican Government was held liable for laxity and inadequacy of punishment for the murder of an American citizen. When though the accused had confessed the guilt, the Court refused to issue arrest warrants and only after a long delay the accused were tried and sentenced to a term of 5 years' imprisonment. The Commission held that the laxity shown by the authorities was only partially redressed by the punishment finally imposed. In the case of Chase[8] the United States was awarded 5,000 dollars damages for the failure of the Mexican authorities to try and punish a Mexican national for having seriously wounded the claimant. The assailant was arrested but was released on a bond in 1914 and was never brought to trial. The Commission expressed the opinion that " international justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty." In the case of Way, the United States was awarded a sum of 8,000 dollars for the denial of justice resulting from the unwarranted conduct of a Mexican inferior judicial officer. He had issued a void warrant for arrest of an American to two men who shot and killed the accused. The Judge along with two others was tried and convicted. The Judge who was considered the principal party was however let off within a year which the American Government contended was a wholly inadequate mode of dealing with the offence. The Mexican State contended that it was not responsible for the acts of minor officials like the Judge in question. The Commission held that a State is responsible for the acts of its minor officials whether judicial or otherwise if it results in failure of a nation to live up to its obligations under the international law. In another case (Dyches) the United States was awarded compensation of 8,000 dollars on the ground that an American national was kept in detention for over a year pending trial when the maximum punishment for the offence was only a year as ultimately decided by the Supreme Court though he was convicted by the Lower Courts to a sentence for over 6 years. The Commission held that though the

7. (1930) Y. B. 226.

8. (1930) Y. B. 223.

Supreme Court having corrected the error, it would in ordinary cases not have amounted to a denial of justice in the particular case, the long and unreasonable delay of the proceedings in a simple case brought it within the rule especially when taken along with the maltreatment of the accused in jail which was proved in the case. These opinions on the facts can hardly be taken to be decisive so far as general international law is concerned as the terms of the reference did not require the Commission to confine itself strictly to international law and also having regard to the unsettled conditions in Mexico which prevented the application of the rules of international law governing States with normally efficient systems of administration, judicial and otherwise.

Some distinction is sought to be made between judicial and legislative bodies of the State and the administrative or executive and that while the State might be liable for the latter should not be made liable for the former. The present tendency of juristic opinion is reflected in the resolution of the Institute of International Law at Lausanne extracted above. But this view does not exclude the distinctions made by Hall between the extent of State liability in each of those cases. In the case of action by the administrative officers and the naval and the military commanders, the liability is highest because they are engaged in carrying out the policy and the particular orders of the Government and they are under the immediate and disciplinary control of the executive and presumably therefore acts done by them are acts sanctioned by the State and until such acts are disavowed and until if they are of sufficient importance, their authors are punished, the State may fairly be supposed to have identified itself with them. In such cases, the Government is bound to disavow them and to inflict punishment giving reparation when necessary. Judicial functionaries are less closely connected. There are no well-regulated States in which the judiciary is not so independent of the executive that the latter has no means of checking the acts of the former. Again judicial acts might be municipally right though they may effect an international wrong. And even when they are flagrantly improper, no power of punishment may exist. All therefore that can be expected in the case of wrongs inflicted is that compensation shall be made and if the wrong is caused

by an imperfection in the law of such a kind as to prevent a foreigner from getting equal justice with a native of the country that a recurrence of the wrong shall be prevented. Wrongs by legislative bodies generally arise with reference to expropriating legislation and we will come back to it later. According to Oppenheim, however injurious to a foreign State the activity of Parliament may be, it can never constitute an international delinquency. This cannot be correct. States will have to bear vicarious responsibility. Though the position of a Government especially in the case of representative Government is difficult, that does not concern the wronged State which has a right to demand satisfaction and reparation for the wrong done. According to Hall, it follows from the indisputable duty of a State to provide itself with the best means of fulfilling its obligations that if the laws are such that it is incapable of preventing armed bodies of men from collecting within it and issuing from it to invade a neighbouring State it must alter them. Applying the same test to Courts, if its judiciary is so corrupt or prejudiced that serious and patent injustice is frequently done to foreigners it ought to reform the Courts and in isolated cases, it is responsible for the injustice done and must compensate the sufferers. It is however impossible to maintain that a Government should provide itself with the most efficient means that can be devised for performing its international duties. A despotic Government may be better able to do so than a constitutional Government. It cannot be pretended that a State is bound to alter the form of polity under which it chooses to live in order to give the highest possible protection to the interests of foreign States. To do so, would be to call upon it to sacrifice the greater to the less and to disregard one of its primary rights of independence —the right that is to say of a community to regulate its life in its own way. All that can be asked is—according to him—that the best provision for the fulfilment of international duties which is consistent with the character of the national institutions, it being of course understood that those institutions are such that a State with them can be described as well ordered to an average extent. A community has a right to choose between all forms of polity through which the ends of State existence can be attained but it cannot avoid international responsibility on that plea of a deliberate preference to anarchy.

Coming to judicial functionaries, the Institute of International Law at Lausanne in its draft declared that the State is responsible if the procedure of its tribunals or the judgment is manifestly unjust especially if they have been inspired by ill will towards foreigners as such or the citizens of a particular State. The draft prepared by an American Committee of Jurists in 1928 defines denial of justice for which the State is responsible as including the denial, delay or exceptional difficulty of access to the Courts, gross deficiencies in the judicial or remedial process, the absence of those guarantees which are indispensable to the proper administration of justice or a manifestly unjust judgment. But it adds that an error of a national Court which does not produce manifest injustice is not a denial of justice. According to Oppenheim in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion and the same is valid with regard to obvious and malicious act of misapplication of the law by the Courts which is injurious to another State. The Sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law is of a different opinion. "A judicial decision," it declares, "whatever it may be, even if vitiated by error or injustice, does not involve the international responsibility of the State." It admits that the State is responsible for denial of justice but this it defines narrowly as the refusal to allow foreigners access to the Courts. According to this view, the decision of a Court may be intentionally erroneous, it may be a misinterpretation of the law or it may be manifestly unjust but the State is not responsible for injuries sustained by foreigners as a result of the decision. This view has the support of weak and backward nations but it is not the view on which Great Powers act and has apparently few supporters among jurists outside Latin America and the Orient. The irresponsibility of the State for the wrongful decisions has been supported in the award of the Senate of Hamburg as arbiter in the Croft case and in the case of Yuille Shortridge Company. We have referred already the cases on the other side. Westlake's opinion is that the State cannot excuse itself by laying the fault on the judges or on a jury, however independent of the executive its constitution makes them. The reason given is that International Law is not concerned with the

particular forms of organisation which the States adopt; it merely proclaims their responsibility leaving them free to discharge their international obligations through such organs or agencies as they may see fit to establish.

In 1923, when the murderer of the Russian Delegate to the International Conference was acquitted by a jury in Switzerland in the face of incontrovertible evidence, the Soviet Government refused to accept the verdict and held the Swiss Government responsible and the latter denying responsibility, the Soviet Government declared a boycott of the Swiss goods and later resorted to other measures of reprisals, such as the expulsion of Swiss nationals from Russian territory. In 1928, the Parisian Jury condemned the murderer of Italian Consul only to two years' imprisonment which the Italian Government considered very inadequate. Similar was the position taken by Italy on the murder of General Tellini in Greece. In these cases, the person murdered was an official representative in whose case a greater degree of diligence is insisted on and so they may stand on a special footing and may not be authority on the general question. On political murders generally and of political representatives in particular, the Council of the League of Nations adopted the following opinion given by a Committee of 10 lawyers, viz , "the responsibility a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal. The recognised public character of the foreigner and the circumstances in which he is present in the territory entail upon the State a corresponding duty of special vigilance on his behalf." The rather high standard of diligence insisted upon by the United States and adversely commented on by Hall has not found favour with the experts. Miscarriage of justice in political cases is very possible both in Paris and the United States of America where the jury are so often elected representatives. To avoid international squabbles, a succession of American Presidents have urged the transfer of jurisdiction in cases involving offences against aliens to Federal Courts. In order to avoid the charge of imperfect attention to the claims of foreigners, several American States have provided for compensation being paid to foreigners by the counties or towns concerned when

they become victims of mob outbreaks. There are similar provisions also in Belgium, France and certain of the German States.

Liability for the acts of private persons, mobs and insurgents.—The duty of a State in respect of private persons is only to exercise due diligence to prevent internationally injurious acts on the part of private persons and in case such acts have been committed to procure satisfaction and reparation for a wronged State as far as possible by punishing the offenders and compelling them to pay damages when required. Beyond this the State is not responsible. If it has not exercised due diligence, it would be responsible. This rule applies whether the acts are directly against foreign State representatives or against private individuals. The rule is not different though larger claims have sometimes been made with respect to the acts of rioters or insurgents. Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots no less than the risk of the outbreak of other calamities. Its Courts must be accessible to the foreign subjects for the purpose of claiming damages from the offenders and its Courts must punish such of those acts as are criminal. A higher claim was made in Santa Isabel case by the United States of America against Mexico but was repelled by the Commission. The Government was exonerated as it had not omitted to take reasonable measures to disperse and capture the bandits. Some jurists would make a distinction between mob violence generally and mob violence directed against foreigners as such.

Another kind of international delinquency which has received considerable attention in recent years is non-payment of money due from a State to other States and nationals of other States. Right of States to intervene in such matters is conceded if necessary even by war. But Drago, the Foreign Minister of the Argentine Republic, put forward the doctrine that States should not use force for the recovery of their national's debts. This note was evoked by the action taken by the British and German Governments against Venezuela which included bombardment of a port. Lord Palmerston took the view that that it was entirely a matter in the discretion of the State concerned whether to resort to diplomatic representation or to force.

The views of Drago were put forward for adoption at the Second Hague Conference at the instance of the American representative and was agreed to in a qualified form, viz., that force may not be resorted in respect of debts due to subjects till arbitration is offered and refused. Covenant of the League affirms this view of the matter. There is some distinction in this matter between a foreign loan and a loan negotiated in the local market. In the latter case, the national has no right to protection as he takes it with his eyes open and subject to all risks. It will be noticed that the Convention does not apply to debts due to a State. In order to avoid foreign State intervention, the Governments of a number of Central and South American Republics frequently insert in contracts with foreign nationals a clause known as the Calvo clause whereby the foreign national renounces the claim to international intervention. Though they may have the effect of ousting international jurisdiction till local remedies are exhausted, they have been held generally not to have the effect of ousting the right conferred upon the State to intervene in its own right and not in the right of the national. In this matter President Wilson was of opinion that "No Government ought to support its nationals in claims to the detriment of the country against which the claim is made." He always refused to support capitalists who had made investments abroad which were unreasonable or gave them an undue advantage. Before using force States would undoubtedly have regard to the taxable wealth of the State, purposes of the loan whether it was incurred to meet the personal wants of the ruler or for economic development, the economic policy of the country with which the debtor trades and finally not so as to make it impossible to the State to carry on its activities. In this as well as other matters State intervention would be much affected by the question as to whether the foreign national is one permanently residing in the State or is a mere traveller or temporary resident. In the former case, seeing that he must be deriving benefit by intimate association with the State, it might be less right to intervene on his behalf then in the latter case.

There is influential opinion in favour of the view that the international law has regard to vested rights and would not permit expropriation of the rights of foreigners without compensation. There is an extreme view on the other side

on which the Soviet has acted that the State is not bound by any such rule. An intermediate view that is supported by Sir John Fisher Williams is that all that a foreigner can insist upon in this matter is an equal treatment with the nationals and if the legislation affects equally the foreigner and the national, the foreigner or his State cannot complain.

In the Chorzow Factory case between Germany and Poland, a clause in the Geneva Convention providing for expropriation was regarded as a derogation from the "rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights" and therefore in the nature of an exception which should be strictly construed and could not be extended. But even so the Commission was of opinion that expropriation for reasons of public utility, judicial liquidation and similar measures were not affected by the Convention (Publications of the Permanent Court of International Justice Series A, Decision No. 7). The question whether when a State passes a general law of expropriation it is compelled to grant special treatment to foreigners was not decided in this case. That there is a general expectation that a foreigner will not be deprived of his property without compensation goes without saying but that it confers upon the foreigner a right under all circumstances is quite another proposition. As their Lordships of the Privy Council observed in *Jerusalem-Jaffa District Governor* v. *Sulciman Murra*[9] when the question arose whether an ordinance providing for expropriation without full compensation offended against the article of the mandate relating to the safeguarding of civil rights "this does not mean—as the Supreme Court recognised—that all the civil rights of every inhabitant of Palestine which existed at the date of the Mandate are to remain unaltered throughout its duration; for if that were to be a condition of the Mandatory's jurisdiction, no effective legislation could be possible. Nor does it in their Lordships' opinion mean that in every case of expropriation for public purposes full compensation shall be paid. Their Lordships agree that in such a case and in the absence of special circumstances, justice requires that fair provision shall be made for compensation. But this depends not upon any civil right but (as the

9. (1926) A. C. 321 at 328.

Chief Justice said) upon principles of sound legislation." Again as observed in *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia*10 there is a distinction between legislative jurisdiction and rights of property. There it was a question in respect of fisheries and the question was as to whether the legislature could regulate the hours of fishing and require the taking out of a licence of fishing and their Lordships held that the fact that the property rights in the fishery vested in the Provincial Government did not preclude the Dominion Government from legislating in respect of those matters or imposing taxes upon the property. By the issue of paper money, a Government may destroy almost the whole of the public debts which they owe in their currency whether to foreigners or to nationals. No foreign Government has taken up the cause of nationals in those circumstances. On the other hand in a recent case before the German Supreme Court (*see* 1928 Y. B. 12) the claim of the foreign bond-holders that the German devalorisation law was contrary to international law so far as it affected foreign bond-holders was rejected. The case is specially valuable as under the German constitution the rules of international law are accepted as a part of the law of the country. The American constitution which prohibits the taking of private property for public use without compensation has been held not to prevent the States from doing so for "police purposes," that is to say, in the regulation of the morals, health and safety of the community, as distinguished, it is said, from "confiscation of private property as national policy, whether communistic, anti-foreign or merely for mercenary purposes." The Supreme Court of the United States has upheld under this head legislation which in effect abolished without compensation the right to specially cheap transportation granted to a person as a compensation for injuries sustained (219 U. S. 467), suppression of a livery stable kept in a particular district without compensation (237 U. S. 171) and reducing the value of a real estate by a Zoning ordinance (47 Supr. Court Reporter 114). This police power may justify the suppression of absinth as in France, liquor as in America, or large landed estates as

10. (1898) A. C. 700.

in Austria-Hungary. Resort to Police power is not the only way in which property can be affected prejudicially. A State with collectivist leanings might deprive owners of a large part of their profits by imposing heavy income-tax or even of property by imposing heavy death duties or making a capital levy ? It would be an interference with the independence of Sovereign States to say that they should not pursue what economic policy or social doctrine that they should consider beneficial but should so order their house as not to affect the property rights of aliens who by entering into the country should *prima facie* be taken to assent to the laws of the country.

The principle of national treatment was recognised in the judgment in the case of *The Reparation Commission* v. *The United States of America* where the question was whether the property of the Standard Oil Company in Germany should be considered subject to the payment of the charges provided for by the laws carrying out the Dawes plan. The judgment is prefaced by the statement "Whereas in the application of a generally accepted principle any person taking up residence or investing capital in a foreign country must assume concomitant risks and must submit under reservation of any measures of discrimination against him as foreigner to all the laws of the country, whereas therefore an allied or associated national having invested capital in Germany has no ground for complaint if for this reason he incurs the same treatment as German nationals, whereas the principle of equality of treatment and not of discrimination in favour of allied and associated nationals has been consecrated by the Treaty of Versailles dealing with the treatment accorded in Germany to the interest and property of the said nationals". Applying this principle, it was held that the Standard Oil Company's property was equally subject to the imposts along with the German nationals. The Italian Government introduced legislation creating a monopoly of life insurance with no compensation to existing insurance companies doing business in Italy many of which were foreign. The foreign Governments concerned protested and several jurists supported them. The Bill however became law in 1912. The only concession made was to allow companies both national and foreign 10 years, a longer period than originally proposed to wind up their business. The South African Republic had recently under consideration

legislation as to diamonds which involved the acquisition of valuable rights without compensation. Uruguay proposed legislation similar to the Italian but on protest from the Governments concerned dropped. The British objections were based on the general grounds that the measure involved expropriation without compensation, that the British Insurance Companies had spent large sums in erecting and extending their business subject to the regulations imposed by Uruguay law, that it was only by continuing to carry on business that they could expect to recoup themselves and that under the proposed law valuable assets comprised in the term goodwill would be annihilated" but the general tone of the British remonstrance was more akin to that of diplomatic remonstrance against a measure, *e. g.*, an increase of customs duties which though clearly within domestic jurisdiction, nevertheless may have harmful effect on the interest of a foreign country. In the case of Toberman, Mackey and Company the United States claimed damages from Mexico on behalf of the claimant for losses sustained on account of the negligence or lack of care of the Mexican Custom authorities in consequence of which a quantity of hay, which had been placed on the wharf and inadequately protected from exposure, was spoiled. The claim was disallowed by the Commission on the ground that there is no clear principle of international law which obliges a Government to take special care as if it were a private storage concern of merchandise which comes through custom houses for the purpose of exercising the sovereign right of collecting import and export duties. In respect of this item of "goodwill", even those who are in support of vested rights theory without qualification as to national treatment are willing to make a distinction. Discussing the clause of the American constitution as to expropriation of private property without compensation, Mr. Justice Holmes says: "No doubt a business may be property in a broad sense of the word and property of great value... But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes absolutely to protect." The report of the Committee of Jurists engaged under the auspices of the League of Nations seems to adopt the view that national treatment is the utmost that an alien can demand for his property. On the question of treatment of foreigners, this is what the report says, "Here also, the

will of the community of peoples is clearly defined. It accepts the abovementioned rights" (to which I have already referred as being the minimum which a State should accord to foreigners in its territory) but it does not thereby recognise the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a State is obliged to accord such treatment, to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to nationals. In any case, a State owes nothing more than that to foreigners and any pretension to the contrary would be inadmissible and unjust both morally and juridically". Even those that are for national treatment of aliens would recognise an exception in favour of pretended national treatment but in fact a discrimination against foreigners having regard to the facts of the particular case—*e.g.*, where the property expropriated is in fact all foreign property. The International Law Association at Vienna on August 9, 1926, resolved as follows on the question of protection of private property:—

1. It is generally recognised by the constitutions, civil codes or common law of civilised States that private property may not be expropriated without compensation.

2. In so far as the question of immunity of private property from confiscation arises in international relations the same principle is generally accepted.

3. A State is by the law of nations entitled to intervene to protect its nationals in another State (*a*) from injury to their property resulting from measures which discriminate between them and the nationals of such other State, and (*b*) from actual injustice even if there is no such discrimination.

4. It is contrary to the principles of international law . . . to deprive a foreigner of the fundamental rights to which he is entitled as owner through indirect ways which though not in law but in fact lead to an expropriation without compensation. Discrimination against foreigners is a ground of interference even in other cases where domestic jurisdiction is more widely recognised. We shall consider that aspect of the case more fully in the next lecture.

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CORRESPONDENCE.

We gladly publish the following:—

NATIONAL ASSOCIATION OF THE LEGAL PROFESSION IN INDIA.

CIRCULAR.

1. A unified, homogeneous bar for the whole of India has been the dream of eminent Indian lawyers, for the realisation of which they have worked both in and outside the legislatures. The Bar Councils Act was a step towards bringing about unification. More than five years have elapsed since the Act was passed, but the process of unification has not kept pace with time. It is felt that some further measures are called for in order to accelerate unification.

2. At present, the local bars are engrossed with the Courts in their own districts and with purely local questions relating to the administration of law in their districts. Even in a single district there may be separate bars, one confined to the Civil Courts and another to the Criminal Courts, with very little inter-relation or cohesion. The result of this state of things is a narrowing down of the outlook, a failure on the part of members of the bar to appreciate the wider duties and responsibilities of the profession and inability to adopt adequate measures to efficiently discharge the collective responsibilities of the profession.

3. In the domain of law and administration of justice there is much need for collective action. The settlement of civil disputes in a satisfactory manner is a necessary part of the economic life of the community. Where the costs of litigation are excessive, it becomes an expensive luxury beyond the means of a majority of the people and the utility of the courts of justice is to that extent diminished. The legal profession, acting in co-operation with the judiciary, can do much to bring about reforms in the procedure so as to reduce costs and delays in litigation.

4. There are, besides, other ways of rendering service by the members of the profession to the public. Apart from helping in the administration of justice by the practice of law in the Courts, they can serve the people through the legislatures and public bodies and generally by securing for the people and working a liberal and representative constitution. Theirs is also the duty, when occasion arises, of assisting in a liberal interpretation of the constitution, by the Courts.

5. There was a time when the legal profession was the preserve of certain classes of persons. To-day, it is a thoroughly demo-

cratic profession in the sense that it allows free entry to man or woman, irrespective of class. The profession comprises members drawn from every section of the public, and therein lies a dual advantage. The members are acquainted with and are competent to bring to bear upon the problems calling for solution the needs and sentiments of their constituency, *i.e.*, the class from which they come, and secondly, they are best able to convey, in the most suitable and acceptable form, the conclusions to which they arrive, to their respective constituencies. At present this is rendered impossible owing to the lack of any organised action on the part of the profession.

6. Apart from acting as hindrance to the ultimate unification of the Bar, this state of isolation deprives the local bars of the advantages to be derived from the exchange of information, current thoughts, ideas and experience of the profession. Each bar is left to tackle its problems without the benefit of any guidance from another bar that may have successfully dealt with the same or similar conditions. The result is an unnecessary waste of energy, duplicated efforts, and hardship to the public.

7. Organisation is not an end in itself, but a means to an end; that end is the development of professional consciousness and the regaining of lost leadership by the profession. Leadership has been lost because of the failure of the profession to discharge its collective responsibility to the public. Leadership in the administration of justice is a great employment, but that alone should not satisfy a profession which is fitted to chart the course of government, and social and economic progress. The legal profession is best fitted to debate the leading questions of the day and crystallize sentiment to the point of action, and then direct its course. A consideration of and contribution towards the solution of the problems at present facing the country would be in keeping with the heritage of the legal profession in India.

8. If co-ordination of the bar is not permanently to remain a pious hope, if the profession is to regain its lost leadership, some action seems to be urgently called for. The time has come for the formation of a NATIONAL ASSOCIATION OF THE LEGAL PROFESSION IN INDIA. If such an Association is formed, it would be possible for a body of delegates, representing the profession in all parts of the country, to meet periodically for a comparison of views and for friendly intercourse. The Executive Committee of the Association would adopt measures for establishing closer relations between the bar associations in the districts, and an organic connection between the several associations. It may be conceded that the foundation period will be long, the growth slow and the organisation at first, largely social. Nevertheless a beginning must be made. The Association can give a strong impetus in the direction of the nationalisation of the Bars. With better times coming, the

growth of the Association is bound to be rapid, but the foundation has to be laid without further delay. The Association will give a powerful impetus and aid towards organising local bar associations wherever they do not exist and strengthening those that are already in existence. It will, in fact, have a powerful, cohesive, co-ordinating and vitalising effect upon the bars throughout India.

9. To weld together all the separate bars into one body of common understanding and common sympathy and common purpose inspired by the spirit of public service is essential to India if justice is to be secured, and law and its administration are to keep pace with the rapid changes of life in our country.

10. Having regard to the importance of the subject, it is proposed to have a Committee consisting of representatives of each of the principal bar associations in India, to consider the matter in all its aspects, and, if thought fit, to take steps to bring the Association into existence, thereby beginning a new and useful chapter in the history of the legal profession in India.

11. The undersigned begs, therefore, to invite through your Journal, every Bar Association in your Province, to nominate one or more representatives to serve on the proposed Committee and to communicate their names and addresses, at its earliest convenience, to the undersigned. The Committee will carry on its work either by correspondence or by holding a meeting or meetings or in such other manner as may be deemed convenient.

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SUMMARY OF ENGLISH CASES.

ATTORNEY-GENERAL *v.* JACKSON, (1932) A C. 365.

Executor—Right of retainer—Insolvent estate—Debt due to executor—Crown debt for arrears of tax—If executors can retain against the Crown—Administration of Estates Act, 1925—*Bankruptcy Act,* 1914.

By his will, a testator, who died in June, 1929, bequeathed the whole of his estate to *J* whom he appointed his sole executrix. The estate was insolvent. The assets were worth only £1,000. The Crown had a claim for arrears of income-tax and super-tax of over £4,000. There were other creditors for £4,000 including a claim by the executrix for £1,000 lent to the testator. The executrix claimed to retain the whole of the assets to satisfy her debt. The Crown disputed her right to retain against their debt, at any rate to the extent of "one year's assessment" under S. 33 of the Bankruptcy Act, 1914, read with S. 34 of the Administration of

Estates Act, 1925. As one year's tax itself came to more than £1,000 the question did not arise if the Crown could claim priority for the whole arrears.

Held, that the law allows the executor to retain so much as will pay himself before any other creditors whose debts are of equal degree. The statute, as here, has in some cases exalted simple contract debts to a higher degree of priority. To the extent to which the Crown's claim for taxes is given priority in bankruptcy it is a debt of a higher degree than that of the executrix in this case and she cannot exercise her right of retainer in priority to such claim.

In re *Ambler*, (1905) 1 Ch. 697, not approved.

STEADFORD *v.* BELOE, (1932) A.C. 388.

Income-tax—Pension to Headmaster—Discretionary payment—If chargeable to income-tax—Income-tax Act, Sch. E and Finance Act, 1922, *S.* 18.

The governing body of Bradfield College, who are a corporation founded by Royal Charter, had the power under the charter to apply the funds under their control to give allowances and pensions to persons who have been headmasters in their school. On the retirement of the respondent they granted him a pension. It was a matter entirely of their discretion and voluntary and could be withheld at any time.

Held, that the payment is voluntary and not chargeable to income-tax. It is not a profit from the headmaster's employment or given to him in respect of his office, as it is not given to him until he resigned his office and no longer held the office. It is not therefore taxable under Sch. D as a profit because a mere voluntary gift is not a profit within the meaning of Sch. D, since it is not, in the true sense of the word, income but merely a casual payment which depends upon somebody else's good will.

Duncan's Executors v. *Farmer*, 5 Tax Cas, 417, distinguished.

HEARTS OF OAK ASSURANCE CO., LTD. *v.* ATTORNEY-GENERAL, (1932) A.C. 392.

Industrial Act, S. 17, sub-sec.* (1)—*Industrial Assurance Company—Inspector or Commissioner investigating a company's affairs—If can hold enquiry in public.

Held, by the House of Lords, Lord Dunedin dissenting, that an Inspector appointed by the Industrial Assurance Commissioner under S. 17 of the Act to examine into and report on the affairs of a company amenable to the Act "is not entitled to conduct the

inspection in public but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry his duty under the statute." Such an inspector "is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said sub-section and by S. 76, sub-sec. (5) of the Friendly Societies Act, 1876, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto."

The same rule applies even when the Commissioner enquires into the affairs himself. The nearest analogy is that of an Inspector appointed by the Board of Trade under S. 135 of the Companies Act, 1929, to investigate the affairs of a company and to report thereon.

In re *Grosvenor and West-End Railway Terminus Hotel Company,* (1897) 76 L.T. 337, applied.

HOARE & CO. *v.* COLLYER, (1932) A.C. 407.

Income-tax—Brewery Company—Owner of 600 houses—Some houses let at reduced rents, rents being foregone for purposes of trade—Others at excess rent—If excess rent can be set off as against the claim for deduction for low rent houses—Income-tax Act, 1918, *Sch. D.*

A brewery company owned about 600 leasehold or freehold licensed houses let to tenants who were under an obligation to take their supply of beer exclusively from the brewery company. In the case of some of these houses they were let at rents less than the annual value under Sch. A of the Act in the case of freeholds and less than the head rent in the case of leaseholds. These reduced rents are accepted for the purpose of increasing the volume of beer sold. In some cases the rents received by the company exceeded the annual value or the rent as the case may be. By virtue of *Usher's case,* (1915) A.C 433, the company are entitled in preparing their accounts for assessment under Sch. D as profits from the trade to deduct as an expense the difference between the rent received and the Sch. A assessment on the basis of property. The Crown contended that, in a case where one owns a number of houses like this, the houses must all be treated as one entity, and that surplus rent received in some cases by the company over and above Sch. A assessment should go in reduction of the amount of allowances to which the company is entitled where the rent is below such assessment.

Held, that excess of rents over valuations cannot in respect of any house be taxed under Sch. D, whereas by *Usher's case*, (1915) A C. 433, the company is entitled to a deduction under Sch. D where it has foregone the rent. The contention of the Crown will be to bring into charge under Sch D the thing which admittedly is not chargeable at all, namely, in the case of every house where the rent exceeds Sch A valuation, the amount of the excess. Therefore although the rents foreborne and the expenses incurred in the case of certain houses form a proper item of debit in the account under Sch. D, the rents received in the case of other houses in excess are excluded from that account.

Fry v. *Salisbury House Estate, Ltd.*, (1930) A.C. 432 followed.

THE KING *v.* B. C. FIR AND CEDAR LUMBER CO., LTD., (1932) A C. 441.

Income-tax—Canada—British Columbia Taxation Act, 1924, c. 254—Fire insurance amount—If liable to tax as income from business.

A company was carrying on business in British Columbia in Lumber. In 1923, their plant and premises were destroyed by fire. These subjects were insured against loss by fire under annual policies. The company was also insured by the insurance companies against further loss or damage they might sustain in the event of their plant either in whole or in part and for a period being shut down or its working suspended in consequence of fire. The former was termed insurance in respect of "fixed charges" and the latter in respect of "loss of net profits." The amount received under "fixed charges" was treated as a receipt on capital account and not disputed. The question arose whether the receipt from the insurance company in respect of "loss of net profits," was liable to be brought into account for income-tax assessment,

Held, that this insurance receipt was produced by a premium paid out of revenue for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. It is therefore necessarily a revenue receipt of the business which must have been brought into account for determining the "net income" of the business for income-tax purposes.

Commissioners of Inland Revenue v. *Newcastle Breweries*, (1927) 12 Tax Cas. 927 and *J. Gliksten & Son, Ltd.* v. *Green*, (1928) 2 K.B. 193: (1929) A.C. 381 followed.

BARTON *v.* REED, (1932) 1 Ch. 362.

Landlord and Tenant—Lease of premises—Restrictive covenants against user for business but only for residence—Underlease

on the same terms—Underlessee carrying on business—Breach of covenant—Lessee knowing of breach but not stopping it—Covenant in lease not to do or suffer to be done any business—If lessors entitled to re-enter.

The Governors of a College granted in 1865 a lease of a private residence on their premises to *D* for a term of 84 years. The lease contained, beyond the usual conditions, a restrictive covenant that the lessee or his assigns, etc., shall not *use or suffer* the same to be used for the carrying on thereon any trade, business or manufactory. The lease contained a proviso for re-entry on breach. In 1894 the lease was assigned to *R* subject to an underlease by *D* to *G* for 79 years. The underlease also contained the restrictive covenant. *G* assigned the underlease to *P* who converted the building, till then used as a single dwelling house, into three flats and let them out on rent. *P* also agreed to supply the occupants with hot water, heat, lighting, cleaning, etc. The Governors issued notice to *R* complaining of the breach but she took no steps to prevent *P* from continuing the breaches. In an action for re-entry,

Held, that what *P* did constituted carrying on of business and a breach of the covenants of her underlease. Subletting of premises in suites of apartments with or without the provision of any other service is a business. As there is no contractual relationship between a lessor and an underlessee, the lessor can re-enter only if it also amounts to a breach by *R*, the assignee of the lease. The covenant binding on *R* is that she will not "suffer" the premises to be used for the carrying on thereon of any business. "Suffer" is a wider term than "permit" and it covers allowing something to be done which the covenantor has the complete power to prevent, and it also imposes on the covenantee a liability to take legal proceedings to prevent the thing being done." As *R* did not take steps to prevent *P* from doing business after she came to know of it, there was also a breach of the covenant by her, entitling the lessors to re-enter.

Atkin v. *Rose,* (1923) 1 Ch. 522 followed.

In re Sir Thomas Spencer Wells. Swinburne-Hanham *v.* Howard, (1932) 1 Ch. 380.

Crown—Bona Vacantia—*Mortgagee—If trustee of equity of redemption—S. 296, Companies Act, 1929—If retrospective.*

A company mortgaged its interest in three leasehold properties to *W* and assigned to him, the whole of the unexpired residue of the terms for which they were held subject to the usual proviso for redemption. It covenanted also to repay the mortgage amount with interest at 4 per cent. per annum. In 1910, the company went into voluntary liquidation and a liquidator was appointed. In 1916,

the company was dissolved but as then there was a large sum due to the mortgagees and the liquidator thought the equity of redemption was of no value, he took no steps to either surrender it to the mortgagees or sell or dispose of it to any other person. After dissolution, the rents on the property increased and the mortgage amount was largely paid off therefrom. The equity of redemption became of value and the Crown claimed to be entitled to it as *bona vacantia* and *W* claimed to be entitled to it free from any equity of redemption.

Held, that the transaction between the company and *W* took the form of an absolute assignment of the whole terms, subject to the equity of redemption. The only cases where the Crown can claim as *bona vacantia* property or money in the hands of another person is where the Crown can show that the property or money is held upon a trust which has failed. If the property had been sold by the mortgagees prior to the dissolution of the company, and the position was that on the dissolution of the company, the mortgagees had in their hands moneys representing the proceeds of the sale, which were in excess of the amounts required to repay them their debt, then the mortgagees would be holding the amount in their hands as trustees for the mortgagor and the Crown would have a good title to those moneys. But the mortgagees are not trustees of the equity of redemption to the mortgagor. It is an equitable interest in the land which could have been asserted by the company and as the company has ceased to exist, the right can no longer survive to the Crown. The dissolution of the company enures for the benefit of the mortgagees and they hold an estate on dissolution freed from any right in any one to redeem.

RUSSIAN AND ENGLISH BANK *v.* BARING BROS. & CO, LTD., (1932) 1 Ch. 435.

Banker—Bank incorporated in Russia—Branch in England—Action brought by British share-holders in the name of London Branch—Head office dissolved by Soviet legislation—Action if can be continued—Position of the Branch—Companies Act, 1929, *S* 338, *sub-sec.* (2).

A banking corporation incorporated in 1911 in Russia with its head office in Russia, established a branch in London in 1915. In 1917, Bolshevist revolution broke out and at some subsequent date the Bank was dissolved or otherwise ceased to exist according to the Russian law. Nearly three-fourths of the shares were held by British share-holders and an action was commenced by them in England in the name of the London Branch to recover moneys alleged to belong to the plaintiffs in the hands of the defendants.

Held, that on the dissolution by the Soviet Decree, which is like laying of the axe at the root of the tree, the foreign corpora-

tion with its branches ceased to exist. A defunct corporation is in the eye of the law no party at all and when once the Court is made aware that the plaintiff is non-existent and therefore quite incapable of maintaining the action, it is bound to put an end to it. The acts of those who have intermeddled with the affairs and assets of the branch, after the destruction of the parent company, can be regularised by adoption and ratification by a liquidator in a winding-up under S. 338, sub-sec. (2) of the Companies Act as an unregistered company. As there are no continuing members of a dissolved company, the petition will have to be presented by a creditor of the company.

Opinion of Lord Finlay in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse,* (1925) A C. 112 not followed.

Goukassow's case, (1923) 2 K.B. 682 followed.

In re MORTON: MORTON *v.* MORTON, (1932) 1 Ch. 505.

Family settlement—Agreement between four out of five members of family—Fifth not heard of for 12 years by them—Subsequent appearance of the fifth member—Refusal by him to ratify or concur in the settlement—Result of.

By a will, dated 1914, a testator W. M. devised all his estate to his wife absolutely. He died in 1928, after having survived his wife and without having made any further will. Therefore he died intestate. According to the law of intestate succession, his five brothers were entitled to succeed. The whereabouts of one of the brothers *T. M.* was unknown, he not having been heard of for over 12 years at the date of the death of *W. M.* As *W. M.* had expressed a desire to give a share to his niece *M. H.*, who was living with him from her infancy, the other four brothers executed a family settlement giving her a share in the property. *T. M.* subsequently appeared and claimed his one-fifth refusing to concur in the arrangement.

Held, that a family arrangement come to by the persons who have signed the deed without the knowledge or in the absence of one member of the family intended to be affected thereby, is to be regarded, in the absence of any proviso to the contrary, express or implied, as having been entered into on the assumption that the absentee will in due time join in the transaction. His concurrence is therefore an implied condition of the validity of the arrangement, and if it is not obtained, the arrangement is not binding on any of the parties to it.

Peto v. *Peto,* (1849) 16 Sim. 590 and *Bolitho* v. *Hillyar,* (1865) 34 Beav. 180 followed.

The fact that *T.M.* is not named as a party in the deed does not distinguish this from the above cases as he is referred to there-

in so as to make it plain that the deed was made upon the supposition that if living he would ultimately concur in the arrangement.

In re DAVIES' WILL TRUSTS. BEVAN *v.* WILLIAMS, (1932) 1 Ch. 530.

Construction of statutes—Complicated legislation—Two possible constructions, one taking away a vested right and another retaining it—Rule of construction.

"It is right in the case of complicated legislation," such as the Law of Property Act, 1925, "to place a benevolent construction on the various sections, and in a case of doubt to avoid the result that rights possessed before the coming into force of the Act are seriously affected or even destroyed as a consequence of a difference in the legal machinery which the legislature has thought fit to create in an endeavour to simplify the law."

In re P. E. AND B. E. KERN, (1932) 1 Ch. 555.

Bankruptcy—Execution—Part payment of judgment-debt to withdraw Sheriff—Subsequent payments in instalments—Adjudication as bankrupt of judgment-debtor—Instalments within three months—First payment beyond three months—Liability to repay—Bankruptcy Act, 1914, *Ss.* 37 *and* 40.

In execution of a decree for £214, it was agreed that the debtors should immediately pay £100 to the creditor on account of the judgment debt and the balance by monthly instalments of £20 each. In pursuance thereof £100 was paid on August 30, 1930 and two instalments of £20 on September 26, and October 27. As default was committed in further payments, the creditors entered into possession of the properties on December 13. On December 16, a receiving order was made on the debtor's own petition and the debtor was adjudicated a bankrupt. The trustee in bankruptcy claimed from the creditors the sums received by them in execution, as money paid by the bankrupt under an execution which was not completed before the date of the adjudication.

Held, that undoubtedly the two sums of £20 were repayable as having been received within the date of 3 months to which the trustee's title relates back under S. 37. Even as regards the sum of £100, it is repayable as having been received in execution which was not complete on the date of the receiving order within the meaning of S. 40 and it is not necessary for that purpose that the receipt should also be within the period mentioned in S. 37. If the execution creditors choose to keep alive the execution for a long time for their own purpose, they cannot complain of hardship. "S. 40 is a substantive enactment and the right of the trustee thereunder is not limited to the benefits of execution received by the

execution creditors after the date to which the trustee's title to the bankrupt's property relates back."

LAZARD BROS. & CO v. BANQUE INDUSTRIELLE DE MOSCOW, (1932) 1 K.B 617: 101 L.J.K.B. 65.

Practice—Judgment against non-existent person—Validity of—Russian Bank—Decree against—Garnishee proceedings founded on such decree—Bank ceasing to exist by date of decree—Garnishee order, if can be issued.

L, an English Firm, having a claim in debt against a Moscow Bank, sued the Bank in the English Court and, with leave of the Court under O. 9, R. 2, sent notice through registered post to the defendant Bank. Judgment was later signed against the Bank in default of appearance. *L* Co. then obtained a garnishee order nisi against another Bank *M* in respect of moneys said to be owing by *M* Bank to the Russian Bank. The *M* Bank contested the order on the ground that the Russian Bank had ceased to exist and that the service of notice on the Russian Bank was irregular.

Held, that on the evidence and reading the Russian decrees, the Banks in Russia had been nationalised and had ceased to exist as separate entities, at any rate from the time when the steps directed for the nationalisation of the banks had been finally completed. Further the order for service under O. 9, R. 2 was invalid and a nullity and no garnishee proceedings could be founded upon it.

Per *Scrutton, L.J.*—The rule that if a person injuriously affected by a judgment by default and not a party to that action desires to set aside the judgment, he must apply either in the defendant's name, if he is entitled to use it, or in his own name, by a summons served both on the plaintiff and the defendant, to have it set aside, does not apply to the case of a non-existent person, or defendant on whom no summons can be served. "If it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead, or a company which was at the time dissolved, or non-existent according to the law of its country of origin, the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void."

Per *Slesser, L.J.*—It is necessary "in order to found garnishee proceedings, that there shall be a judgment upon which proceedings may be based, and it is very clear, when the matter is fairly considered, that there was not in existence here any judgment on which the Court could properly Act. A defendant has a right to have a default judgment set aside if it is signed irregularly." As a general principle, when the Court comes to

the conclusion that it has been induced to act upon affidavits which are not candid and do not fairly state the facts, but are stated in such a way as to mislead the Court, there is power in the Court to protect itself and prevent an abuse of the process."

WESTMINSTER BANK, LTD. *v.* OSLER; NATIONAL BANK, LTD., *v.* BAKER, (1932) 1 K.B. 668.

Income-tax—Bank—Conversion of War-bonds to conversion Loan and War Loan—Profits by such conversion—If taxable.

The Banks had acquired National War Bonds of various issues. In the events which happened none of the said bonds was repaid by the Government, but they were converted into 3½ per cent. conversion Loan Stock or into 5 per cent. War Loan 1929-47. The question was whether in arriving at the profits of the Bank for the purposes of the income-tax assessments, there should be included any sum as representing profit resulting from such conversion.

Held, that by conversion the Banks put an end to the existence of the National Bonds as such in their hands, and preferred, instead of waiting till the due date, to exchange the Bonds at the time when they did for these new issues. It is simply a case of a sale on certain terms fixed by the Government, and investment of the proceeds. Therefore, whether in the books of the Bank they did so or not, this is to be regarded as a definite change of an investment upon certain terms which reveal an enhanced price, and the margin so revealed by that enhancement of the price is the profit and is therefore liable to income-tax.

Royal Insurance Co. v. *Stephen,* 14 Tax Cas. 22 approved and the dicta in *California case,* 5 Tax Cas. 159 and *Brown* v. *National Provident Institution,* (1921) 2 A C. 222 relied on.

W. T. LAMB & SONS *v.* GORING BRICK CO., LTD., (1932) 1 K.B. 710: 101 L.J.K B. 42.

Damages—Breach of contract—Appointment as "Sole selling Agents"—Sale by manufacturers (Principal) direct—If breach of the contract.

By an agreement in writing, the defendants, who were manufacturers of bricks and other building materials, appointed the plaintiffs, "sole selling agents of all bricks and other materials manufactured at their works" for three years and afterwards "continuous subject to twelve months' notice by either party." About two years later, the defendants wrote to the plaintiff that they intended in the future themselves to sell all materials without the intervention of an agent and actually sold some directly. In an action for damages for breach of contract,

Held, by the Court of Appeal and Wright, J., that the words "sole selling agents . . . ." mean that the plaintiffs were to have the right of selling in their capacity as agents all the bricks, etc., manufactured by the defendants themselves and that during the currency of the agreement neither the defendants nor any other agent appointed by them, can sell the materials.

Snell Grove v. *Elbringham Colliery Co.*, 45 J.P. 408 followed and *Bentall* v. *Vicary*, (1931) 1 K.B. 253 distinguished by Wright, J. and Scrutton, L.J. *Per* Greer and Slesser, L.JJ.: "Neither of the cases affords us any assistance one way or the other in the present case" as both of them deal with the relation of principal and agent and neither of them has to do with purchasers and their vendors.

VAUXHALL ESTATES, LTD. *v.* LIVERPOOL CORPORATION, (1932) 1 K.B. 733.

Statutes—Construction—Provision in earlier Act that provisions in other Acts inconsistent with it "shall cease to have or shall not have effect . . ."—Provision in a later Act inconsistent—Effect of.

The Acquisition of Land (Assessment of Compensation) Act, 1919, provided for the assessment of compensation of lands compulsorily acquired under it on a particular basis and by S. 7, provided that "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect . . ." S. 46 of the Housing Act, 1925, provided a different mode of calculation of compensation which was inconsistent with the mode provided in the 1919 Act.

Held, that even assuming S. 7 of the Act of 1919 applies even to provisions in future Acts, it is open to Parliament at any subsequent time to repeal or amend the enactment of 1919 either expressly or impliedly and where there are two inconsistent provisions found in two Acts of Parliament, the one passed subsequently to the other, the later provision shall prevail and shall be deemed impliedly to repeal the earlier provision in accordance with the maxim "*Leges posteriores priores contrarias abrogant.*"

Per *Avory, J.*—"S. 7 of the Act of 1919 in its true construction is restricted to existing Acts of Parliament."

BACK (INSPECTOR OF TAXES) *v.* WHITLOCK, (1932) 1 K.B. 747.

Income-tax—Resident of Straits Settlements—Change of residence to England—Income arising from foreign possessions—

No change in the nature of income—Method of calculation of income-tax—Income-tax Act, 1918, Sch. D, case V, r. 1 and Finance Act, 1926, S. 29.

The respondent, having resided in the Straits Settlements for many years, took up his permanent residence in England in April, 1927. While in Straits Settlements he was in receipt of income from stocks, shares and rents arising in the Settlements and that income continued after his arrival in England. The income in the year previous to settling in England was larger than that during the year of assessment and the question arose if the case fell under S. 29, sub-S. (1) (*b*) (*ii*) of the Finance Act, 1926 as of income first arising in April, 1927, when he came to reside in England.

Held, following *Fry* v. *Burma Corporation*, 1930 A.C. 321, that the income of the respondent cannot be regarded as having arisen only when he swam into the purview of the Income-tax Acts. The income did not first arise in the year preceding the year of assessment.

MANN *v.* NASH, (1932) 1 K B. 752.

Income-tax—Profits of illegal trade—Liability to tax—Income-tax Act, S 237, Sch. D.

The assessee who was trading as an amusement caterer, was also dealing in, or the use of, certain automatic machines which were made for "unlawful gaming." These machines he placed with the proprietors of public premises so that persons resorting to the premises might indulge in gaming by the use of them. The profits which thus accrued were divided between the assessee and the occupier of the premises. It was contended for the assessee that an illegal trade is not a trade within the meaning of the Income-tax Act and its profits are not liable to be taxed.

Held, that the letting out of these machines in a commercial way with a view to the reception of profits in a commercial way is a "trade" so that the profits are chargeable to tax and the consideration that it is tainted with illegality does not affect the liability to tax. The State finds profit made from what appears to be a trade and taxes it. It does not thereby follow that the State is either condoning or taking part in it or sharing in the illegality.

Hayes v. *Duggan*, (1929) I.R 406, dissented from.

F. E. SELDON *v.* CROOM-JOHNSON.

SAME *v.* BRUCE THOMAS, (1932) 1 K B. 759.

Income-tax—Barrister becoming a King's Counsel—Whether sets up a new profession thereby.

The question was if a practising barrister sets up a new profession when he commences to practise as King's Counsel.

Held, when a Barrister is made a King's Counsel, what happens is that the Sovereign confers a titular rank which is recognised in the Courts by giving the holder precedence, a seat within the bar, and by entitling him to wear a silk gown. He abstains from doing certain classes of work which he did before appointment. But he is still acting in the same way as before, practising the art of advocacy. Both the junior Barrister and the King's Counsel carry on the same profession; only, the King's Counsel occupies a higher rank of degree within it. The King's Counsel does not therefore "set up . . . within the year of assessment" a new profession within the meaning of R. 1, sub-R. (2) of the rules applicable to cases I and II in Sch. D to the Income-tax Act, 1918.

JOTTINGS AND CUTTINGS.

Retirement of Mr. Justice Rowlatt.—After twenty years' judicial service Mr. Justice Rowlatt has retired, and thereby the King's Bench Division loses one of its ablest and most expeditious judges. A very learned lawyer, he employed the leisure hours of his early days at the Bar by writing the classic treatise on the law of principal and surety, but very soon thereafter he became one of the busiest of juniors and ere long was appointed to the responsible post of common law Treasury "devil," which made him busier still. That post he held for seven years concurrently for a part of the same period, with the Recordership of Windsor, so that he came to the High Court Bench well equipped for the more important duties which there confronted him. Like the other common law judges he had to take his share in the varied work that falls to them, both in town and on circuit, but from the frequency of his being in charge of the revenue paper the profession came to associate his name almost exclusively with the difficult and not very exhilarating branch of litigation there dealt with. The decision of intricate points of income-tax law appeals little to the man in the street, or indeed, to any one save litigants striving to escape the meshes of the inspectors of taxes, and the little group of specialists who have "Dowell" at their finger ends, with the consequence that Mr. Justice Rowlatt was much less often in the public eye than many of his judicial brethren. This in no way perturbed the learned judge who has never courted the public gaze and has been content to dispose of his lists quietly and unostentatiously. So identified has he been with the revenue paper that it was eminently fitting that at the conclusion of the term's list the Attorney-General should have offered some happily phrased valedictory remarks, dwelling on the pleasure it had been to all members of the bar to argue cases in his Court where, as he said, the gathering had always partaken

more of the character of a family party than of a meeting of opponents. Mr. Justice Rowlatt was obviously gratified with this expression of regard, and we may assure him that he will carry with him in his retirement the good wishes of the whole profession for many years of quiet enjoyment.—*S.J.*, 1932, p. 221.

The Rights of a Time-expired Convict.—The action *Bottomley* v. *F. W. Woolworth & Co., Ltd.* (*The Times,* 2nd and 3rd March) was brought by Mr. Bottomley in respect of certain matter defamatory to himself contained in an American Magazine sold in England The defendants pleaded that they were ignorant of the libellous matter, and Horridge, J., held that, in effect, there was no evidence that their ignorance was due to negligence, a matter on which the finding of the jury, who awarded Mr. Bottomley £250, was adverse to them. A point of law, however, on which Mr Bottomley and the judge did not see eye to eye arose on the position of a person who has "done time". Mr. Bottomley is reported elsewhere to have "quoted a case" to the effect that one who has served his sentence is in the same position as he who has received the King's pardon, a proposition to which the judge did not give assent. The case was not mentioned in the other report, but it may be surmised with some confidence that it was *Leyman* v. *Latimer,* (1877) 3 Ex. D, 15 and 352. The head-note on page 15 in fact rather supports Mr. Bottomley's contention than otherwise. The defendants had called the plaintiff a "felon editor," and pleaded that the plaintiff had been convicted of and sentenced for a felony. The plaintiff replied that having served his sentence he beame as cleared from the crime and its consequences as if he had received the Queen's pardon under the Great Seal. On demurrer this was held a good reply. The judgment of Cleasby, B., however, hardly appears to go further than to rule that a person convicted of felony and sentenced does, on the expiration of his sentence, cease to be a felon like one who holds the King's pardon, and therefore must not be so called. A true statement that a person has formerly been convicted of a particular offence cannot, of course, give rise to damages in a civil action. Criminal proceedings might lie if such a statement, though true, was made wantonly, in circumstances which did not justify assertion so provocative. Anyone released after duly serving either a sentence of penal servitude or imprisonment is no doubt in the usual case in the most deplorable situation, and suggestions that he is minded to commit the same or any other class of offence, unless amply justified by evidence, merit severe damages against those who utter them. There is a distinction, however, between "this is a soiled dove" and "this was once soiled dove." The past can be lived down but not expunged, for, in Mr. Kipling's language, "though you mount and continue the race, the hoofslides are scarred o'er the course."—*S.J*, 1932, p. 221.

Slaughter of Animals.—The Slaughter of Animals Bill now before Parliament, if passed into law, will put an end once and for all to the anomalous state of affairs which has been existing for some years past in regard to the humane slaughter of animals. That there is every prospect of the Bill becoming law demands of little doubt. It is a non-party measure backed by representative members belonging to each of the four political parties. Some years ago the Ministry of Health published model bye-laws with regard to the use of humane appliances for the slaughter of animals, and these bye-laws have been adopted by a certain number of local authorities with results which have proved very satisfactory. The Bill now before Parliament incorporates appropriate portions of these model bye-laws and applies them to the whole country. The object of the Bill is to ensure that all animals except swine slaughtered in slaughter-houses and knackers yards' in England, whether for human food or otherwise, shall be humanely killed. It is provided that all slaughter men shall be licensed so that only competent persons can be employed, and it provides for the inspection of slaughter-houses not only by the police but by inspectors of local authorities and also by officers of societies for the protection of animals who are authorised by the Minister of Health to have access to such places. The penalties for breach of the Act are severe and include a fine of £20 for a second offence, after which the same fine may be repeated, plus imprisonment not exceeding sixty days. There is also a provision which will be welcomed (in view of the shocking disclosures that have appeared from time to time in the newspapers) by which the wholesale slaughter of animals affected by foot and mouth disease is to be carried out by officers of or persons employed by the Minister of Agriculture using mechanically-operated instruments approved by the Minister. Proper provision is, of course, made for the slaughter of animals by Jews and Mohammedans in accordance with their religious beliefs—*S J*, 1932, p. 222.

Judges and Knighthood.—In the life of Lord Eldon in Campbell's "Lives of the Chancellors", we are told that, when that great lawyer was appointed Solicitor-General, "to the high contentment of the Bar, and the general satisfaction of the public," he modestly wished to avoid knighthood, but George III then laid down a rule, which has been adhered to ever since, that the Attorney-and Solicitor-General, and the judges, if not "honourable" by birth, shall be knighted, "to keep up the reputation of the ancient Order of Knights-bachelors." As most people are aware, nearly all of the judges, immediately after their appointment, receive the dignity of knighthood in accordance with this old rule. Some of our older readers may remember that Mr. Justice R. S. Wright struggled hard to escape being made a Knight—a

dignity which, said he, put him on a level with City Aldermen and others with whom he had no desire to be likened In the end, the practice or custom was too much for him, and so, with a very bad grace, he accepted the honour which he considered no honour at all, in this resembling the man mentioned by Frederick Locker Lampson, in his entertaining book "Patchwork," who, having met a friend who had just been given a handle to his name, said "A knighthood, I presume?" "No," said the other, "a baronetcy." 'I am sorry for that," replied the first. "Sorry, why?" asked the recipient of the dignity. "Well," answered his candid friend, "you see, if it had been a knighthood the infamy would at least have died with you," a somewhat cruel observation even for a candid friend. The order instituted by George III above referred to excepts from the obligations of being knighted those who are "honourable" by birth. Several sons of peers on being promoted to the Bench have on this account declined to be knighted, among these being Mr. Justice Denman and the present Lord Russell of Killowen. Others have been content not to vary from their colleagues in this matter and have accepted knighthood as has just been done by Mr. Justice Lawrence, who, as the son of a peer, could have claimed to be excused.—*S J*, 1932, p. 293.

Mental Defect.—A most valuable recommendation is that before a sentence of preventive detention is passed the prison authorities should be required by statute to submit to the court a statement containing a report from the prison medical officer on the mental and physical condition of the offender, such information as can be collected as to his history and circumstances, and observations as to his suitability for such a sentence The question of psychological treatment the committee approach with considerable caution. They do not agree with the view that crime is a disease or generally the result of mental disorder: they do, however, believe there is a certain amount of persistent crime due to abnormal mental factors and that "there is reason to suppose that certain delinquents may be amenable to psychological treatment." They permit themselves. therefore, to recommend that a medical psychologist should be attached to one or more penal establishments, that selected cases should be placed voluntarily under treatment, a systematic follow-up conducted over a prolonged period, and the results—failures as well as successes—of such accredited medical psychologists published in due course. A reasonable concession if not all that was hoped for in some quarters.—*L.T.*, 1932, p. 428.

Lawers on the Saturday Review.—The *Saturday Review*, which has just changed hands, started on its career in 1855 with a staff which was chiefly composed of members of the Bar, several of whom were to rise to high positions in the Profession. Among

these were Sir Henry Maine, Charle Bowen Fitzjames Stephen, Sir William Harcourt, Thomas Collett Sandars, and George Stovin Venables, the last-named being usually accounted the prototype of George Warrington in Thackeray's "Pendennis," It was a brilliant galaxy of writers whom John Douglas Cook, the editor, gathered round him when he left the *Morning Chronicle* and started the famous weekly. From the first, as someone has said, the new journal was lacking neither in ability nor in audacity, in both respects of each of the contributors playing his part. Speakig of Fitzjames Stephen, his biographer—his brother, the late Sir Leslie Stephen—says that as became a good Saturday reviewer, he fell foul of many popular idols. One of these was James Payn, whose fiction achieved a certain popularity, which of itself was an excellent reason why Stephen should trounce it to his heart's content. Years later the novelist and the reviewer became intimate friends, and the latter on one occasion re-called with no little amusement how he had pitched into one of Payn's novels. Payn did not perceive the humour of the situation quite as keenly as did Stephen, and he says that he noted with no little satisfaction that after his reviewer reached the Bench the newspapers usually referred to him as "the hanging Judge." However, not all Stephen's contributions were conceived in a savage strain, and a goodly number of the less severe were afterwards collected under the title "Horæ Sabbaticæ." Bowen, who had a lighter touch than his future judicial colleague, told one of his correspondents with much humour that all the articles with hard historical names were his, getting them, as he went on to say, from Bayle's Dictionary, while the quotations from Seneca he was obliged to compose himself, not having a Seneca in the house.—*L.T.*, 1932, p. 438.

Lord Brentford and Sir Donald Maclean.—Within the last fortnight the political world has become the poorer, by the death of two solicitors, Lord Brentford, known till recently as Sir William Joynson-Hicks—a name which invited and received contraction into "Jix", without any loss of the esteem in which he was held, but rather as a mark of popularity—and Sir Donald Maclean. Of different political parties, but of the same evangelical religious faith, they were almost of the same age and each practised in London, though Sir Donald Maclean also practised in Cardiff. Lord Brentford was a member of the firm of Joynson-Hicks & Co., and Sir Donald of Church, Rackham & Co., and each rose to a high position in his party by solid gifts of integrity and character, rather than brilliance. Sir Joynson-Hicks was Home Secretary in the Conservative Government from 1924 to 29, thus weathering the storm of the General Strike, and in the latter year he went to the House of Lords as Viscount Brentford. But before this elevation he had been a foremost opponent in Parliament of the

proposed changes in the Prayer Book Sir Donald Maclean was handicapped in his political career by the declining fortunes of the Liberal Party, but when in the confusion of parties at the end of the War Mr. Lloyd George had ceased to be its leader, Sir Donald Maclean took his own independent line and led a remnant, furlorn, perhaps, but sincere. Upon the formation of the present Government he was one of the Liberals included and became President of the Board of Education, and upon its departure from the traditional policy of Free Trade he was in the minority who "agreed to differ." It is not long since it was rare for solicitors to attain high political rank, but a change began when Sir Henry Fowler left Wolverhampton to hold the various offices which culminated in his being Secretary of State for India and going to the House of Lords as Viscount Wolverhampton. But since then a solicitor has held the premiership during, perhaps, the most critical years of the history of this country, and the loss of Viscount Brentford and Sir Donald Maclean still leaves a number of well-known solicitors in responsible public life.—*L.J.*, 1932, p. 421.

Courts and Parliament.—There was one question in the New *South Wales Case*, of which we wrote (p. 393 *ante*), on which we should have liked to have had a decision from the Judicial Committee. Can the Courts of a State interfere to restrain Ministers or Officials of Parliament from doing acts which are in the ordinary course of legislative procedure? When this case was in the New South Wales Courts (31 N.S.W. 183 and 204-5) it was keenly argued for the Ministers who sought to resist an injunction that no command could issue to prevent them from having free access to the King's representation, or from passing, or helping to pass, any law—whether *ultra vires* or not. The judiciary, they said, has no control of the Legislature and cannot enjoin it not to pass an unconstitutional Act—though it may condemn that Act as *ultra vires* when it comes before them in the Courts The Chief Justice (Street, C.J.) felt some difficulty in meeting the argument, but decided that those who asked for an injunction were not asking the Court to interfere in the affairs of Parliament, but to protect them against a breach of the law from which (as members of the threatened Upper house) they would suffer special loss. The objectors did not fight on this ground either in the High Court of Australia, or, so far as the report shows, in Whitehall; but we must confess to a certain affection for it. One cannot argue from English Precedents for the New South Wales Parliament is not a Sovereign Parliament. Here with us, of course, it is a fundamental rule that Parliament (King, Lords, and Commons) is master of its own procedure.—*L.J*, 1932, p. 422.

Persistent Offenders.—The grave peril to society constituted by the persistent offender has long exercised thoughtful minds. Of

39,000 persons imprisoned in 1930 more than 50 per cent had already been once in prison and more than 12 per cent. ten times and more, and not the least difficult aspect of the problem was felt to combine the general principle of gradation of sentences according to the gravity of the offence with that of relating them to the offender as an individual and not to the particular charge before the Court. The preventive detention of the 1908 Prevention of Crime Act meant an empty life with no reformative value, and as practised had no application to any but the old lag, whereas the twenty-one to thirty class constituted in 1930, 25 per cent of the total convicted of indictable offences—*L.T.*, 1932, p. 427.

The Report.—The report just published confers a public service: it deals with this vital matter in a bold and practical manner, free of sentimentality, and keeps in view from beginning to end the paramount necessity for checking criminal propensities and fitting the offender for return to normal life. The solution put forward is detention of a duration to permit of reform and imposed by Courts of assize and quarter sessions in lieu of and not in addition to imprisonment or penal servitude. This new detention would be of two different types. "Prolonged detention" (five to ten years), imposed largely in the public interest, would be for the "professional" criminal, but would be more directly remedial in aim than at present: in the case of "detention" (two to four years) there would be an attempt to subject the prisoner to discipline and control on the general lines of Borstal training as adapted to more adult offenders. Conditions would be at once less repressive and definitely more strenuous than in ordinary imprisonment, the personal relation would be introduced by putting one responsible man in charge of a small group, and education would be made an integral part of training and related as closely as possible to the industrial occupation pursued, while an attempt would be made to utilise prisoners' labour on work of national importance.—*L.T.*, 1932, p. 428.

New South Wales and Manitoba.—Who could seriously think, for instance, of a Chancery Judge's granting an injunction to veto the picturesque formalities of Royal Assent of which we read in the otherwise prosaic pages of Erskine May? Another interesting point is to compare this great decision with that in *Initiative and Referendum Act*, In re, (1919 A.C. 935: 88 L.J.PC. 142). Where New South Wales succeeded, Manitoba failed: and the attempt of the great western territory to fit itself out with a *referendum* was nipped in the bud. The reason was that the measure which proposed to establish it did not pay sufficient respect to the position and powers of the Lieutenant-Governor of the Province. His "office" was withheld from the area of legislative power which was assigned to the Provinces of British North

America by the Imperial Act of 1867. This, at least, was the reason given in Lord Haldane's judgment, though we must say, with respect, that as to the most important provision of the Manitoba Act it is difficult to support it. For the rest, Lord Haldane made one observation which, if it applied in New South Wales, would have gone for to help the unsuccessful litigants of last week. Speaking of certain powers to delegate legislative capacity which the Provinces had exercised, he went on to say:—

"but it does not follow that it can create and endow with its own capacity a legislative power not created by the Act to which it owes its existence."

This is just what the successful litigants in New South Wales did; and now they have had their right to do it vindicated —*L.J.*, 1932, p. 422.

Whips and the Lords.—Goodness and mercy are indeed manifest in some parts of modern legislation; as in the Children and Young Persons Bill, which the Lords last week, were considering in Committee. So far as consistent with economy or reduced expenditure, there will be children's courts, kept apart by dates, places, or associations from the courts where older or more hardened offenders are tried. Praiseworthy and laudable motives are behind the proposed enactment. Moreover, the words "conviction" and "sentence" old lags both, with criminal associations, are eliminated from the Bill and from the language of the new juvenile tribunals. Such words have an evil savour and leave an evil mark upon the mind.

But despite some display of benevolent opposition on the part of the Government, the Lords by 65 votes to 22 decided that after what used to be called conviction, but may now be called a finding of Naughty, the Courts might leave their marks upon the offending child. Whipping was not, indeed, resolved upon until references had been made to their Lordships' boyhood days and public school punishments and results. The Juvenile Court whipping is indeed to be done decently and in order: a constable will act as executioner in the presence of a sergeant, the parents to have the right of free admission to the show. But when such nasty words as "sentence" and "conviction" are taken away, ought not the constable to be taken out of uniform and disguised as a cleargyman? The "officer of higher rank" as a Bishop, an Archdeacon or a Rector at the least?—*L.J.*, 1932, p. 430.

Preventives.—One might, indeed, go further back and give the children and their punishment to the ecclesiastical courts. A constable in uniform whipping a naughty child seems all out of harmony with the general benevolence of the Bill.

It is not, perhaps, fair to play the carping critic and to offer no more than one constructive suggestion. The Bill has yet a long

way to go before it becomes an act of Pariament, and one may suggest an alternative remedy.

Accepting as beyond all reasonable doubt the fact that the ancient public school punishment (apart from that advocated by King Solomon) has helped to make so many members of the House of Lords what they are, why not, before having recourse by Act of Parliament to constabulary whipping of children, try the effect of impositions? Take those hardened little criminals to whom Viscount Bertie and Lord Atkin referred. Compel them to write out the speech of Lord Danesfort, with its allusions to public school and Holy Writ, twenty times at one sitting. It would be difficult to refute the objector who called this torture; but it would probably be very preventive. Whipping is not so; for, as Viscount Exmouth pointed out, amid roars of laughter, reformatory boys whom he had supervised preferred whipping to prayers.—*L.J.*, 1932, p. 430.

Hard for the Judicial Committee.—There has been much discussion in the Temple as to whether the Judicial Committee of the Privy Council, in refusing to advise His Majesty to grant the Dublin Policemen leave to appeal against a judgment of the Supreme Court of the Irish Free State, have or have not justified the criticism of some Dominion Lawyers that its decisions are not wholly uninfluenced by motives of policy. It is, of course, notorious that Dominion critics who would abolish the right of appeal, to the Privy Council do assert that the Judicial Committee does not invariably decide questions wholly and solely on the legal merits of the case. The House of Lords is outside the ambit of this criticism.

Things must be extraordinarily difficult, sometimes, for the Judicial Committee. It is known that their advice to his Majesty, in a particular case, may have grave political consequences; and although its decision may be perfectly sound and good in law, there will always be those who doubt. This Irish case, where it was known that most of the big Free State parties were strongly opposed to the right of appeal; where the Attorney-General for the Free State was not represented or his absence explained, but all was left to Mr. Dickie, K.C., for the appellants—this was a case in point.—*L.J.*, 1932, p 451.

Unofficial Jokes.—It is well that the Bench did not take too seriously the indiscreet practical joke which recently brought a young barrister into that part of the police-court not usually occupied by the bar. Even judges have been known to be led astray by a misguided sense of humour Mr. Justice Field for instance, while travelling with Mr. Baron Pollock, was guilty of one of the most surprising acts of mature irresponsibility. Having surreptitiously got possession of his brother judge's railway ticket, he

confided to the guard of the train that "the old gentleman in the corner" was trying to defraud the company. His delight knew no bounds when his learned colleague was required to produce his ticket and found himself unable to do so. But Pollock, B., was not amused.—*S.J.*, 1932, p. 457.

Other uses for Books.—When Mr Justice Swift recently confiscated a Testament which was being employed to demonstrate a traffic problem, he took the course once adopted by the eminently religious Phillimore, J., when a witness emphasised his evidence by banging the book on the ledge of the witness-box. "Nearly everyone," said Swift, J., "who comes into the box uses the Testament to represent something, sometimes a tramcar and sometimes an omnibus." All books brought into a court of law are liable to be pressed into some such service. While he was at the Bar, the late Mr. Justice Alpers, of New Zealand, once had a running down case in which his opponent overwhelmed the Court with citations. Alpers had no cases, but he commandeered all his adversarys books to build a plan of the scene of the accident. He won on his demonstration.—*S.J.*, 1932, p. 457.

Presumed Dead: Judgment Accordingly.—Until last week one had not believed that the presumption of death was irrebutable. That a Court of Law, in certain circumstances, will admit a presumption of death, thereby rendering lawful and right dispositions of property, which would not have been lawful without proof of death or the judicial presumption of the same, is known to all. But cannot the Court reconsider the case on the disturbingly fresh fact of the man appearing alive and well? If the heir of vast estates appears the day after he is presumed by a Court of Law to be dead, he should have no great difficulty in obtaining so much of the estate as had not already been disposed of. Probably the judgment of Judge Tebbs at Walsall County Court went no further than that; though a newspaper report gives the words as "I have pronounced a judgment presuming that this man is dead, and I have in jurisdiction to alter it." At any rate, it was probable that the small inheritance divided after the judgment and paid to thirteen different relatives had been lawfully spent.

But it was very hard on F. Burford, who had been absent for so many years and unresponsive to advertisements, to find that Judge Tebbs could view him only as a corpse incapable of lawful resurrection in the matter before the Court.—*L.J.*, 1932, p. 15.

Ignoring the Presumption.—Filled with indignation and desiring to put the matter to a further test in another tribunal, the dead man proceeded from the County Court to the house of one of the thirteen relatives who had received his brother's inheritance and, according to report, broke a window. For this he was arrested

and pleaded in vain with the policeman that he was a dead man and could do no wrong. Before the Magistrates he made the like plea in vain, citing the decision of the County Court Judge, and declaring that the decision was enough to stir up any dead man, let alone a corpse as lively as he had proved himself to be.

Here indeed was a legal poser, and the magistrates looked to their Clerk for legal illumination. Fully admitting the difficulty that "the learned Judge having ruled that you are legally dead, I wonder whether you can legally commit a crime," the Clerk seemed to be in a quandry until the prisoner assured him that he felt very much alive. This simple testimony the magistrates accepted, without any adjournment for consultation of legal authorities. The dead man was fined three pounds and given three weeks in which to search for the money.—*L.J.*, 1932, p. 15

Queries.—That difficulties may arise from judgments based on legal presumptions and from other errors is manifest. Burford's is a case in point. In judgments, as in other mortal matters, there is nothing final and absolute. The Judge who boasted to the Bishop: "If I say to a man 'you be hanged', he is hanged; if you say 'you be damned,' he may not be so"—was overstating his powers. The condemned man might die naturally or from poison or a pin in the meantime, or might be reprieved.

Somethings, however, are fairly certain in our law, and one is that a man cannot be punished twice for the same offence. Suppose a young man is found guilty of murder, sentenced to death, and the sentence commuted to one of penal servitude for life. "Life" is not necessarily the prisoner's lifetime; and the definite period may be reduced for good conduct or other causes. If the prisoner, on release, discovers that the man he was found to have murdered is still alive, and rectifies the error by killing him on the spot can he be charged, convicted and punished again for the murder of the same man? The answer would appear to be in the negative. And the situation, though very unlikely, is not impossible There does not seem to be any fully reported case on the point.—*L.J.*, 1932, p. 15

Evidence of Previous Accident.—On Saturday of last week a Divisional Court dismissed the appeal by the defendant in *James* v *Audigier* from an order made by a County Court Judge refusing to grant a new trial. The facts were shortly these: The defendant's motor-bicycle had mounted the pavement at Willesden and injured the plaintiff, who claimed damages. In the course of the cross-examination the plaintiff's counsel asked the denfendant whether, just before the accident than in question, he had had another accident at the same place the results of which had proved fatal, and whether he had told the coroner's jury who had exonerated him anything about the present accident. The defendant

admitted that the fatal accident had occurred, and that at the inquest he had kept silent about the occurrence. The jury awarded the plaintiff £150, and the defendant's counsel, who had not formally objected to the questions, asked for a new trial on the ground of misreception of evidence. Mr. Justice Swift, in the course of a considered judgment, said that it was not competent to ask a defendant in an action for negligence whether he had been negligent on some previous occasion, and still less was it competent to ask him whether he had been involved in some other accident for which it was not suggested he had been to blame. But questions could quite properly be put to him to test his credibility, or to show that he was an inexperienced and unskilful driver, if those matters were in issue, and if in the case before the court proper objection had been taken to the questions, the county court judge would, his Lordship considered, quite rightly have ruled that they were fairly put. The appeal would, therefore, be dismissed.—*L.T.*, 1932, p 22.

Abuse of Cross-Examination—The County Court, like the High-Court, has an inherent general power to prevent the right of cross-examination being abused, and in the course of the above judgment Mr. Justice Swift quoted Order XXXVI, r. 28, of the Rules of the Supreme Court, which provides specifically that "the judge may in all cases disallow any questions put in cross-examination . which may appear to him to be vexatious or not relevant to any matter proper to be inquired into in the cause." His Lordship noted that a similar provision was contained in Order XXII, r. 12, of the County Court Rules. The rules which confine evidence to the points in issue not only preclude proof of uncontroverted facts but limit the mode of proving the issues themselves by excluding evidence of all such collateral facts as afford no reasonable inference with respect to the matters in dispute. "Such evidence," it has been said, "tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead." Moreover, the other party who has had no notice of such evidence, may be unprepared to refute it Generally speaking, it is negligence in a person unskilled or inexperienced to undertake the doing of an act which, in the absence of skill and experience, would be likely to injure others. In the latest edition of "Pollock on Torts," it is said in this connection that "if a man will drive a car, he is bound to have the ordinary competency of a motorist," and that the rule, of which this is an instance, applies "in every case that can be put". In the present case the coroner's jury seems to have found that there was no negligence of the kind in question, though, of course, an inquest and verdict are in many cases inadmissible even though they touch the question of responsibility. Further, the plaintiff's counsel seems to have disclaimed any intention of

imputing blame for the earlier accident. The case for the admission of the evidence may have been stronger on the ground of credibility, and we await a full report with interest.—*L T.*, 1932, p. 22.

BOOK REVIEWS.

THE STUDENT'S COMPANION TO THE INDIAN LIMITATION ACT, 1908, by V. R. Shah, B.SC., LL.B. Published by Ramakrishna Bros., Law Publishers, Poona City. Price Rs. 2.

The Indian Limitation Act is well known to be a comprehensive and complicated Act with a long history behind it. The decisions of Courts on various points arising thereon are by no means uniform and several outstanding questions are still left in a state of conflicting judicial views Books of the kind under review written as easy guides to students cannot adequately do justice to the subject. It may be a question if it is worth while attempting to do so. No doubt University students may find it useful to refresh their memory at the time of approaching examinations. Even as a text-book for students the treatment must be fuller. The present book is however statedly a student's *companion*. It has a modest aim. The author has naturally been very brief in his notes and commentaries. They are succinct and clear so far as they go The law students will find the book useful as an easy and clear introduction to a difficult and complicated subject.

A HANDBOOK OF THE LAW RELATING TO PRESS IN INDIA, by G. K. Roy. Published by Eastern Law House, Calcutta, 3rd Ed. Price Rs. 3 net.

This small but very instructive volume containing in a brief manner all information of the press in India will be found useful by the members of the legal profession as well as persons in the field of journalism who are editors of books or newspapers and keepers of printing presses. The report of the Committee to examine certain Acts relating to Press in India has been succinctly traced in order to enable the reader to have a fuller understanding of the Press Law. The Indian Press (Emergency Powers) Act (XXIII of 1931) and the Foreign Relations Act (XII of 1932) are treated here with the necessary notes along with the report of the Select Committee and Minute of Dissent Also passages from judgments of important cases like those of Mr. Mahomed Ali and Mrs Besant form an interesting portion of the book.

DIGEST OF THE ALLAHABAD LAW JOURNAL (1904-1931), by Katju and Bankey Behari, 2nd Ed. Vol. I. Price Rs. 12.

This attractive publication has everything to be said in its favour. For its usefulness, which the legal profession is sure to

enjoy, nothing need be added by way of praise, as every digest supplies us with a ready source of reference to case-law. But with cross references and in cases, where several points are dealt with, having them noted under several appropriate headings, this digest is bound to be appreciated more. The present has improved considerably upon the previous two editions. A compilation of this kind, digesting cases of the Allahabad Law Journal alone, may not appear quite an original thought to those who have known of a similar publication by the Madras Law Journal nearly two decades back.

INDIAN JUDGES, by Messrs. G. A. Natesan & Co., Madras. Price Rs. 3

Many, who need encouragement to escape succumbing to early trials and disappointments, will derive comfort and spirit from a perusal of this volume, containing anecdotes of the youthful labours and manly struggles of some of the glorious sons of the land But we feel the sketches would be arresting if they were marked by literary flair. One cannot but re-call with feelings of emotion and pride such illustrious names (to mention only a few of those included in this book) as those of Sir T. Muthuswami Aiyar, Dr. Subramania Aiyar, Sir V. Bhashyam Aiyangar and Mr. V. Krishnaswami Aiyar of Madras, Mr. Mahadev Govinda Ranade and Mr. Kashinath Trimbak Telang of Bombay, The Rt. Hon. Ameer Ali and Sir Gurudas Banerjee of Calcutta, Sir Promoda Charan Banerjee of Allahabad, and Mr. Shah Din and Sir Shadi Lal of Lahore. But to chronicle their lives' history and the numerous incidents which sum up their brilliance either as members of the Bar or as ornaments of the Bench is indeed a worthy task. We are not a little thankful to the publishers Messrs. G. A. Natesan & Co for providing us, though not sumptuously, with the details of fine careers that can ever chasten our activities and shape our ambitions. Still the book lacks completeness. For it is impossible for one to get reconciled to the very conspicuous omission of such a great judge and powerful personality as the late Sir Ashutosh Mukerjee in the galaxy of eminent Judges.

THE LAW OF TORTS, by S. Ramaswami Aiyar, Advocate, High Court, Madras. Published by Messrs. Butterworth & Co., Ltd. 1932. Price Rs. 10.

There have been many text-books on various branches of Indian law written by eminent Indian authors and the lawyers turn to them almost every day for guidance when they have to get at the underlying principles and give correct advice on the topics. It is sufficient only to refer to some of the more well known among them, such as Sir Rash Behari Ghose's Law of Mortgages, Mitra's Law of Limitation and Pre-

scription, Sir Gurudas Banerjee's Law of Marriage and Stridhanam, Sarvadhikari's Law of Inheritance, and in more recent years, the works on the several branches of law by the Right Honourable Sir Dinshah Mulla Though on the Law of Torts, we are aware that there are some text-books by Indian lawyers, it is no disparagement to them to say that Mr. Ramaswami Aiyar has reached a higher level of excellence than the others in that his book will meet not merely the needs of a lawyer but will also satisfy the jurist. There have been instances where the ignorance of the historical basis of some kinds of action led to occasional mistakes even by great Judges which have been corrected in later years. Any one who studies Mr. Ramaswami Aiyar's work will not commit any such mistakes based on false analogies, as the author has most clearly pointed out the growth of every action which we are familiar with to-day in the Law of Torts from the earliest times. In the treatment of the various topics, the learned author has displayed great learning and research and has given references to the works of the great masters of law and not merely to the decisions. In some cases, he has criticised the judgments of even eminent Judges and made good his observations on their judgments Further, it is no small credit to the author when we find that by his discussion of the principles on pp. 414 to 418 of his work, he seems to anticipate the pronouncement of the House of Lords in *M'Alister* v. *Stevenson* (1932 W.N. 139: 101 L J 119) which has not yet been fully reported in the Law Reports. The order of treatment of the various topics by the author in his work is more logical than in many other works on the subject, as he deals with the special torts in the beginning and only goes to the general exemptions from liability and vicarious liability towards the end of the book. An analytical and logical treatment of a subject is likely to leave out some of the cases which cannot be clearly brought in under any well-known head; and it is a matter for great satisfaction that the learned author has succeeded in bringing all the decisions under review in their proper places. We can sum up the merits of the work under review by saying that it is not merely one for the lawyer but for the jurist.